



PEN Canada

Submission

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EXECUTIVE SUMMARY

PEN Canada wishes to draw attention to a situation in Canada whereby human rights commissions have taken it upon themselves to act as arbiters and potential constrainers of freedom of expression.

While any rise in hate propaganda is a cause for concern, of equal concern is the belief among human rights commissions in Canada that their mandate—under the aegis of ensuring equality and non-discrimination—in countering hate propaganda extends to the power to limit freedom of expression under the guise of combating hate messages.

PEN Canada considers it essential the government of Canada review both the mandate and the practices of the federal human rights commissions and take the necessary measures for their revision, in order that hate propaganda cases are dealt with ONLY as crimes under the Criminal Code. Furthermore, the federal government should encourage the provincial governments to take similar steps.

INTRODUCTION

PEN Canada works on behalf of writers, authors and journalists who have been forced into silence for writing the truth as they see it.

PEN Canada is the Canadian centre of International PEN, with 1200 members and associate members. PEN lobbies governments in Canada and internationally; we organize petitions; send letters, faxes and postcards for the release of persecuted writers; and conduct public awareness campaigns about freedom of expression. We work for the release of imprisoned writers internationally, against censorship nationally and for networking and professional opportunities for writers living in exile in Canada.

In addition to our Canadian members, our centre has between 25-30 Honorary Members in many countries around the world on whose behalf we work so that they are released from prison and their voices heard once again.

PEN Canada is an independent non-profit organization that is committed to defending freedom of opinion and the peaceable expression of such opinion, as guaranteed by Article 19 of the United Nations declaration of Human Rights. In Canada we support the right of freedom of expression as enshrined in Section 2(b) of Canada's Charter of Rights and Freedoms.

HUMAN RIGHTS COMMISSIONS AND FREEDOM OF EXPRESSION

PEN Canada supports the analysis and the recommendations in the submission *Promise and Reality: Canada's International Human Rights Implementation Gap*, the joint NGO submission to the United Nations Human Rights Council made on September 8, 2008.

In addition, PEN Canada wishes to raise concerns about the human rights commissions of Canada and the issue of hate propaganda.

The purpose of the Canadian Human Rights Act is “to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.”

The Canadian Human Rights Commission administers the Canadian Human Rights Act “and is responsible for ensuring compliance with the Employment Equity Act. Both laws ensure that the principles of equal opportunity and non-discrimination are followed in all areas of federal jurisdiction.”

In turn, provincial and territorial human rights commissions administer their own human rights codes.

The Canadian Human Rights Act states as follows concerning hate messages:

13. (1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

(2) For greater certainty, subsection (1) applies in respect of a matter that is communicated by means of a computer or a group of interconnected or related computers, including the Internet, or any similar means of communication, but does not apply in respect of a matter that is communicated in whole or in part by means of the facilities of a broadcasting undertaking.

(3) For the purposes of this section, no owner or operator of a telecommunication undertaking communicates or causes to be communicated any matter described in subsection (1) by reason only that the facilities of a telecommunication undertaking owned or operated by that person are used by other persons for the transmission of that matter.

Under this section, which was amended in 2001 to include information distributed over the Internet, the Canadian Human Rights Commissions in Canada has taken complaints and held hearings about newspaper and magazine articles published in Canada. Several provincial human rights commissions have received similar complaints and responded to them.

Those hearings have generated a large volume of media and public comment and criticism about the process under which human rights commissions accept such complaints, the rules of evidence and the hearing and decision process itself.

PEN Canada joins other commentators in arguing that human rights commissions are exceeding the bounds of their knowledge, authority and ability when they take it upon themselves to attempt to restrict freedom of expression under the guise of controlling hate messages.

The problem lies in the wording of the act, which describes as a discriminatory practice “ any matter that is **likely** to expose a person or persons to hatred or contempt (bold added).”

Of course *likely* is in the eye of the beholder and such imprecision opens the door for all sorts of complaints. As interpreted by human rights commissions in Canada, there is no requirement for a complainant to prove that any damage has been done at all by the publication of an article, cartoon or book excerpt for instance. The commissions operate under inconsistent rules of evidence and burdens of proof and the rules of fair comment and jurisprudence as interpreted and codified by the courts in Canada do not apply.

Most important: once a complaint is accepted by a commission, the individual or organization against whom an allegation is made is required to pay all the costs of defending themselves before the commission. On the other side, the commission covers all the complainant’s costs, imposing no penalty on the complainant for launching frivolous actions.

The result has been hearings held by human rights commissions and the prospect of rulings that would restrict freedom of expression in Canada by imposing sanctions on publications for publishing material that in no way violates human rights.

As the Canadian Civil Liberties Association has suggested, human rights legislation was designed to prevent discrimination in workplaces, in accommodation and in providing goods and services to individuals. Commissions were created to adjudicate complaints about such issues when they arose. They were never designed to restrict the free expression of opinions.

Hate propaganda is a crime under the Criminal Code.

That’s where PEN Canada believes such complaints should be heard, not under the cover of human rights commissions. The courts have all the advantages that the various tribunals trying to restrict freedom of expression do not possess. Our court system has well-established common rules of procedure for witnesses, evidence, cross-examination, burdens of proof and jurisprudence with a clear appeal process and an appropriately high test that must be met for a conviction. Decisions are made by judges with experience in the law, Their decisions are built on precedent and someone who is charged is either guilty or innocent. That is how it should be.

But the corollary of relying on the courts to defend freedom of expression is that we have to accept that controversial statements will be made that may offend individuals or groups in our society but that fall short of what might lead to a charge under the Criminal Code. Accepting that such statements might be made though doesn’t need to mean keeping quiet - it should mean speaking out and challenging such statements if we disagree - forcing those who make them to defend and substantiate their views in public debate so Canadians can judge for themselves how well-informed those views are. That’s an equally important aspect of freedom of expression as

well and one that requires us to participate as individuals and citizens as well as through organizations such as PEN Canada.

RECOMMENDATION

To ensure there is no repetition of attempts to constrain freedom of expression through the guise of human rights legislation, and to ensure that hate propaganda cases are dealt with solely in the courts under the provisions of the Criminal Code, PEN Canada urges the government of Canada to remove subsection 13(1) of the Canadian Human Rights Act.

Similar wording in provincial human rights statutes should likewise be removed.